In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITIONER'S REPLY BRIEF

A. WILLIAM LUCAS
Counsel for Petitioner
411 North Fourth Street
Post Office Box 1398
Bismarck, North Dakota 58501

A. WILLIAM LUCAS
CONMY, ROSENBERG & LUCAS, P.C.
Counsel of Record
Address of:
411 North Fourth Street
P. O. Box 1398
Bismarck, North Dakota 58501

E. L. MERRIHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

INDEX

CASES CITED

AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1176

NORTH DAKOTA STATE BOARD OF PHARMACY,
Petitioner,

vs.

SNYDER'S DRUG STORES, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

PETITIONER'S REPLY BRIEF

ARGUMENT

There have been many issues raised in the briefs on this appeal, however it is submitted that the basic issue is whether the North Dakota Supreme Court erred in relying on and basing its decision entirely on *Liggett* v. *Baldridge*, 278 U. S. 105, 49 S. Ct. 57, 73 L. Ed. 204 (1928), and whether the United States Supreme Court should now clearly reverse the *Liggett* case to conform with the latter cases and philosophy of this court.

If *Liggett* v. *Baldridge* is not reversed, the Supreme Court would have to revert to a policy it once had of sitting as a super legislature to judge the wisdom, need, desirability, and reasonableness of state laws. We do not believe the Supreme Court will do this.

The Liggett Case Is No Longer Controlling

Despite our argument that the *Liggett* philosophy has been clearly abandoned, the respondent still seeks to rely on it.

The *Liggett* case followed the philosophy of a line of cases shortly after the turn of the century which swung in the direction of requiring a state to prove the constitutionality of its exercise of the police power in such matters rather than presuming such statutes to be constitutional and putting the burden on the party claiming unconstitutionality to prove that the legislature could not possibly have had any reasonable basis for passing such legislation, as had formerly been the philosophy of the court.

Adair v. *U. S.*, 208 U. S. 161 (1908) and *Coppage* v. *Kansas*, 236 U. S. 1 (1915) considered legislation outlawing "yellow-dog" contracts under which employees agreed not to join the union and found them unconstitutional because the statutes impaired contractual rights without any substantial benefit to the public welfare. In the *Adair* case, the court cited *Jacobson* v. *Mass.*, 197 U. S. 11 (1905) and *Lochner* v. *N. Y.*, 198 U. S. 45 (1905) and without any presumption of constitutionality, posed the question as to whether the legislation was a fair and reasonable exercise of the police power of the state.

These decisions, which came to be known as the "Lochner-Adair-Coppage line of cases", along with a few others formed the background for the *Liggett* decision, requiring a showing that:

1. A dangerous situation demanding correction existed, and
2. The State must clearly demonstrate that the statute corrects a recognized evil and does not arbitrarily interfere with private business or impose unreasonable restrictions.

If the Court could not find these two factors present, the statute would be struck down as an unconstitutional denial of due process. To put it in simplest terms, it was as if the burden of proof was upon the State to show why a law was constitutional.

The Pennsylvania statute, adopted in 1927, which was struck down by the *Liggett* decision was almost an exact copy of one passed in New York State in 1923 and whose constitutionality had been upheld by the New York court in *Tucker* v. *N. Y. S. Bd. of Pharmacy*, 127 Misc. 538 (1926).

The majority in the *Liggett* case, speaking through Justice Sutherland followed the philosophy of the "yellow-dog" cases, requiring the state to bear the burden of proof, whereas Justice Holmes and Brandeis in their dissenting opinion clung to the earlier view, which was to be returned to by the court, that if *any* set of facts might justify the legislation it should not be struck down.

Despite the *Liggett* case, New York State continued to find constitutional its statute from which Pennsylvania had copied, as late as July 15, 1931, in *Hauges* v. *Lascoff*, 140 Misc. 811, where it was said:

> "It is by a statute such as the one under consideration that the State in the interest of public health and welfare can, to some measure, control the quality of service to be rendered to the sick. In effect, the command of the statute is addressed to the owner or proprietor of the pharmacy. There the responsibility should remain. Possible penal consequences for illegal acts by the proprietors of pharmacies are not enough. The demand is for consistent quality of pharmaceutical service. Public health means sound health, and it may reasonably require carefully regulated pharmacies to preserve it."

The *Hauges* case was not appealed, but the *Pratter* case was and, in 1932, the Appellate Division in New York State and in 1933, the U. S. Supreme Court struck down the New York statute on the basis of the *Liggett* decision. *Pratter* v. *Lascoff*, 140 Misc. 211; aff. 236 App. Div. 713; aff. 261 N. Y. 509; Cert. denied 289 U. S. 754.

Soon after the *Liggett* decision, the Supreme Court underwent a change in personnel, and, more important, a change in philosophy as regards the extent of the police powers of the states. As early as 1931 (although the Supreme Court stated 1934 as being the turning point in the *Lincoln Union* case, infra), the Supreme Court indicated this shift in emphasis. The case was *O'Gorman and Young, Inc.* v. *Hartford Fire Insurance Company*, 282 U. S. 251 (1931). In question was the constitutionality of a New Jersey law fixing the maximum commissions that could be paid to brokers by insurance companies at "a reasonable rate", and stipulating that no more could be paid to one broker than to another. In upholding the validity of the statute, the majority said:

> "The statute here questioned deals with a subject clearly within the scope of the police power. We are asked to declare it void on the grounds that the specific method of regulation prescribed is unreasonable and hence deprives the plaintiff of due process of law. As underlying questions of fact may condition the constitutionality of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute."

It might be noted that the majority opinion was written by Justice Brandeis, who had joined in Justice Holmes' dissent in the *Liggett* case, and joined in by Justices Holmes, Hughes, Stone and Roberts. Justice Sutherland

was part of the dissenting group in this case, and that dissenting opinion cited *Liggett* v. *Baldridge* and the *Adair-Coppage* line of cases.

Thus, the Court started its return to the position it had originally taken in this area. The presumption of constitutionality of a state police-power statute took over. The Court refused to place itself in the position of being a super-legislative body which weighs the wisdom of statutes. Laws enacted under the power of the state to protect the public health, safety, morals or general welfare would be presumed constitutional—with the presumption of facts before the Legislature to go with it—and only a very strong showing by those challenging the statute would cause the Court to declare a statute unconstitutional. This shift in emphasis becomes more and more apparent as we continue to trace the cases through the Supreme Court.

In 1934, the Supreme Court, in *Nebbia* v. *New York*, 291 U. S. 502, had before it a New York statute which fixed the price at which milk was to be bought and sold within the State. In upholding the constitutionality of the Act, the Court rejected the narrow view of a state's jurisdiction in exerting its police power, and as regards the Due Process clause, stated:

> "The Fifth Amendment, in the field of federal activity and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary or capricious."

In 1935, in *Semler* v. *Oregon State Board of Dental Examiners*, 294 U. S. 608, the Court upheld the validity

of an Oregon statute prohibiting dentists from advertising prices, advertising professional superiority, etc. The Court said in a unanimous opinion:

> "The State has the authority to estimate harmful effect, both in relation to deception and in relation to lowering the standards of the profession and demoralizing it. If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances to which it might have been applied."

Two 1949 cases place the philosophy of the Court in full perspective. *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Company,* 335 U. S. 525, and *Daniel* v. *Family Security Life Insurance Company,* 336 U. S. 220.

The *Lincoln Union* case involved two measures, which the Court treated as one. One was a Nebraska constitutional amendment and the other was a North Carolina statute. Both measures prohibited contracts between employers and unions which would make union membership a prerequisite for the employer engaging an employee. The provisions stated that a person could not be denied employment on the basis of membership or nonmembership in a labor union.

The Court unanimously upheld the constitutionality of the provisions, with Justices Frankfurter and Rutledge writing separate concurring opinions. The opinion of the Court reviewed the *Lochner-Adair-Coppage* line of cases, and then reviewed the cases which undermined the philosophy of that line of cases:

> "This Court, beginning at least as early as 1934, when the Nebbia case was decided, has rejected the due process philosophy enunciated in the Adair-Coppage

line of cases. In doing so, it has consciously returned closer and closer to the earlier constitutional principle that states have power to legislate against what are found to be injurious practices in their internal affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition or of some valid federal law."

In the *Daniel* case, the Supreme Court unanimously upheld the validity and constitutionality of a South Carolina statute which prohibited morticians from acting as agents for insurance companies. The Court stated:

"We cannot say that South Carolina is not entitled to call the funeral insurance business an evil. Nor can we say that the statute has no relation to the elimination of those evils. There our inquiry must stop.

"This rationale did not find expression in *Louis K. Liggett* v. *Baldridge* on which respondents rely. According to the majority in Liggett, 'a state cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them.' But a pronounced shift of emphasis since the Liggett case has deprived the words 'unreasonable' and 'arbitrary' of the content for which respondents contend."

The Court then referred back to the *Lincoln Union* case and that case's review of the *Lochner-Adair-Coppage* refutation.

In 1952, in *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U. S. 421, the Supreme Court was called upon to rule on the constitutionality of a Missouri statute requiring employers to give four hours off with pay to all employees

in order that they might vote. With only one dissenting voice, the Court upheld the constitutionality of the provision. The Court said:

> "The liberty of contract argument pressed on us is reminiscent of the philosophy of *Lochner* v. *New York*, which invalidated a New York law prescribing maximum hours for work in bakeries; *Coppage* v. *Kansas*, which struck down a Kansas statute outlawing 'yellow dog' contracts, * * * and others of that vintage. Our recent decisions make plain that we do not sit as a super-legislature to weight the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare * * * The State legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare; they may, within extremely broad limits, control practices so long as specific constitutional prohibitions are not violated and so long as conflicts with valid and controlling federal laws are avoided. That is the essence of *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, *Nebbia* v. *New York*, 291 U. S. 502, *Olsen* v. *Nebraska* 313 U. S. 236, *Lincoln Union* v. *Northwestern Company*, 335 U. S. 525, and *California Auto Insurance Association* v. *Maloney*, 341 U. S. 105 * * * If our recent cases mean anything, they leave debatible issues as respects, business, economic and social affairs to legislative decisions. We could strike down this law only if we returned to the philosophy of the Lochner and Coppage cases."

In 1955, the Supreme Court decided *Williamson* v. *Lee Optical*, 348 U. S. 483. The Court was faced with a challenge to an Oklahoma statute requiring only a licensed optometrist or opthamologist to fit lenses, prohibiting the renting of space in establishments to other than

those two groups for eye examinations or visual care and prohibiting advertising of such services. The Court met the challenge by unanimously determining that the statute was valid and constitutional. It stated:

> "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.
>
> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws regulatory of business and industrial conditions because they may be unwise, improvident or out of harmony with a particular school of thought. (The Court then cited Nebbia, West Coast Hotel, Olsen, Lincoln Union, Daniel and Day-Brite). * * *
>
> "It is an attempt to free the profession, to as great an extent as possible, from all taints of commercialism."

In *McGovern et al.* v. *Maryland*, 366 U. S. 420 (1961), the Supreme Court, again with just one dissenting voice, upheld the constitutionality of the Maryland Sunday Closing law. Citing the *Semler* and *Lee Optical* cases, the Court said:

> "State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In line with *Douglas* v. *Noble*, 261 U. S. 165, 43 Ct. 303, 67 L. Ed. 590, and *Graves* v. *Minnesota*, 272 U. S. 425, 47 S. Ct. 122, 71 L. Ed. 331, the Court has held

that a state, by insisting upon the personal obligations of the individual, may deny the right to practice dentistry to corporations, *Miller* v. *State Board of Dental Examiners of State of Colorado*, (1932) 287 U. S. 563, 53 S. Ct. 6, 77 L. Ed. 496, may prohibit dentists from advertising or having any kind of publicity, *Semler* v. *Oregon State Board of Dental Examiners*, (1935) 294 U. S. 608, 55 S. Ct. 570, 79 L. Ed. 1086, and may prohibit the selling of eyeglasses at any retail store without the personal attendance of a physician or optometrist, *Roschen* v. *Ward*, (1929) 279 U. S. 337, 49 S. Ct. 336, 73 L. Ed. 722.

And, in connection with chiropractic:

> "Indeed the burden upon the plaintiffs is great, if not insurmountable. They must show that the Act as administered 'has no rational relation' to the regulation of chiropractic and 'therefore is beyond constitutional bounds.' Williamson v. Lee Optical Company, supra, 348 U. S. 483, 491, 75 S. Ct. 461, 466."
>
> *England* v. *Louisiana State Bd.*, 263 F. 2d 661, 669-70, 671-2, 674 (1959).

On April 22, 1963 the United States Supreme Court again refused to follow the "yellow dog" cases. In a case involving a statute prohibiting anyone but a lawyer from engaging in the business of debt adjusting, the court again reviewed the *Lochner*, *Coppage* and allied cases and again rejected them, citing once more *Lincoln Federal Labor Union* v. *Northwestern Iron and Metal Co.*, 335 U. S. 525, 536 (1949) and *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 488 (1955) and saying:

> "The doctrine that prevailed in Lochner, Coppage, Adkins, Burns, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long

since been discarded. We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. As this Court stated in a unanimous opinion in 1941, 'We are not concerned * * * with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the State to an intolerable supervision hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.

In the face of our abandonment of the use of the 'vague contours' of the Due Process Clause to nullify laws which a majority of the Court believed to be economically unwise, reliance on *Adams* v. *Tanner* is as mistaken as would be adherence to *Adkins* v. *Children's Hospital*, overruled by *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937). Not only has the philosophy of Adams been abandoned, but also this Court almost 15 years ago expressly pointed to another opinion of this Court as having clearly undermined Adams. We conclude that the *Kansas Legislature was free to decide for itself that legislation was needed to deal with the business of debt adjusting.* Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us. We *refuse to sit as a 'superlegislature to weight the wisdom of legislation,' and we emphat-*

ically refuse to go back to the time when courts used the Due Process Clause 'to strike down state laws regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.' Nor are we able or willing to draw lines by calling a law 'prohibitory' or 'regulatory.' Whether the legislature takes for its textbook Adam Smith, Herbert Spencer, Lord Keynes, or some other is no concern of ours. The Kansas debt adjusting statute may be wise or unwise. But relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas.

Nor is the statute's exception of lawyers a denial of equal protection of the laws to non-lawyers. Statutes create many classifications which do not deny equal protection; it is only 'invidious discrimination' which offends the Constitution. The business of debt adjusting gives rise to a relationship of trust in which the debt adjuster will, in a situation of insolvency, be marshalling assets in the manner of a proceeding in bankruptcy. The debt adjuster's client may need advice as to the legality of the various claims against him, remedies existing under state laws, governing debtor-creditor relationships or provisions of the Bankruptcy Act—advice which a nonlawyer cannot lawfully give him. If the State of Kansas wants to limit debt adjusting to lawyers, the Equal Protection Clause does not forbid it * * *" (Emphasis added).

Ferguson v. *Skrupa*, 372 U. S. 726, 10 L. Ed. 2d 93 (1963).

The *Liggett* philosophy upon which Plaintiff's claims of unconstitutionality are based, has been abandoned by federal and state courts alike.

Plaintiff should appeal to the legislature rather than to the courts. As was stated by the Supreme Court of Indiana in *Tinder* v. *Clarke Auto Co.*, 149 N. E. 2d 808, 819 (1958):

> "If persons adversely affected by the acts of the legislature consider that the laws enacted to be ill-conceived, unreasonable or oppressive by requiring too great a 'price to be paid for living in a well-ordered society' they should seek relief from the legislature which enacted the law. They should not call upon the courts to invalidate laws merely because they consider such laws to be oppressive, if rightfully enacted within the scope of legislative authority. For us to yield to this demand would be to destroy the very framework of our government."

See McCloskey, Economic Due Process and the Supreme Court: An Exhumation and Reburial, 1962 Sup. Ct. Rev. 34, which presents a comprehensive review of this particular issue.

We submit that the relationship to the public welfare of the statute in question is at the very least debatable, and this alone is sufficient to uphold the statute as being constitutional.

What is the evil which the statute seeks to alleviate? It is the divorcing of the ownership and control of the prescription department of the pharmacy from the professional standards and ethics to which registered pharmacists ascribe.

How does the law seek to correct this evil? By providing an opportunity for professional standards and ethics to have a voice in connection with the management of the business, purchasing policies, services offered, customer relations, quality of service, cooperation with the medical

profession for the public good and providing freedom to make professional decisions without commercial restraint.

We submit that the philosophy of the *Liggett* case has been clearly abandoned and this appeal presents an opportunity for the Supreme Court to make this change in philosophy absolutely clear to all.

Pharmacy As a Profession

In the petitioner's brief on page 22, we have argued that pharmacy is a profession and that as such should be treated the same as other professions which courts have determined cannot be owned or controlled by lay people or nonprofessionals.

The National Association of Chain Drug Stores, Inc., in their amicus curiae brief in support of the respondent on page 3, does not quarrel with the concept that a pharmacist is a "professional."

The respondent apparently recognizes pharmacy as a profession, however on page 23 of their brief, they state as follows:

> "Unlike pharmacies and drug stores, dentistry, optometry, medicine, and other similar professions involve close personal contact between the person seeking the service and the person giving the service. In many, if not most, cases of drug purchases, the purchasers do not even know the druggist, and certainly have very little personal contact with him."

This perhaps is the case with the nonpharmacist owned pharmacies and chain store pharmacies, but as we all know from personal experience, you do develop a close personal relationship with your pharmacist. It just happens that a pharmacist owner of a store has a more permanent position with the store than a nonowner pharmacist or a chain

store pharmacist who is often transferred or frequently changes employment. The transient nature of chain store pharmacists does not promote a close personal relationship with the client.

There is very close personal contact between the pharmacist and his clients and customers just as there is in other professions.

As stated on page 10 of the joint amicus curiae brief filed by the A. Ph. A. and the N. A. R. D., many pharmacists, as a professional service, maintain a patient medication monitor system and this system is now required by statute in New Jersey. It should be pointed out that many pharmacists offer this service on a voluntary basis as an additional service, although very few nonpharmacist controlled stores do this.

As part of this system, the pharmacy maintains a patient profile card which contains all the prescription drugs, the amount, the prescribing physician's name, and the date the prescription was filled. The pharmacist records all of the required information from the prescription on to the profile card. By a thorough examination of the profile card the pharmacist can see if there are any obvious drug incompatibilities (there are hundreds of possible incompatibilities which occur between one drug and other drugs, and between drugs and food or beverages). This is one of the most important functions a pharmacist can perform since he is in the unique position of being able to review all the drugs a patient has received from all the physicians the patient has seen from the prescriptions filled in that pharmacy.

> "In an age of medical specialization it is not unusual for a patient to visit within a short time a family doctor who prescribes an antibiotic for a strep throat, a psychiatrist who prescribes a tranquilizer, and a

dentist who prescribes a painkiller. Some of these medications are compatible with each other and can be taken concurrently. But there are notable and alarming exceptions. For example, certain of the anti-coagulant drugs used after a heart attack, in combination with aspirin, may increase the tendency toward internal bleeding. Some antihistamines, taken along with tranquilizers, may produce dangerously soporific effects.

The physician knows the dangers of drug antagonism, but is not always aware of all the medications that a patient may be taking, especially those bought without prescription. The patient knows what he is taking, but is rarely aware of the dangers. But *there is someone in a position to know both the drugs being taken and the harm that wrong combinations can cause: the pharmacist.* By keeping a medication profile of each steady customer and referring to it each time he fills that customer's prescriptions or sells him over-the-counter drugs, he can prevent the possibility of a harmful reaction." (Emphasis added) Time Magazine, March 5, 1973 at page 73.

A close personal contact with the client or customer is necessary to make the patient medication monitor system work effectively.

After the prescription is filled, the pharmacist must establish that the patient has been instructed how the medication is to be taken and what side effects the patient should be aware of.

The following are a few examples of what can and has happened when the patient has not been told how the medication is to be taken: patients who have had earaches have gone to a physician who has placed reconstituted oral penicillin into their ear, patients who have drunk alcoholic

beverages died after taking sleeping pills because of the potentiation of the two central nervous system depressants.

If a drug prescribed for the treatment of depression is taken and certain foods, beverages, or drugs are then ingested, it is very possible that the patient could suffer a hypertensive crisis and die.

It is very common for the physician not to tell the patient anything about the drug or the side effects which could occur from it. A close personal contact with the pharmacist and the patient is required to inform and advise the patient on use of the medication and possible side effects.

Additional procedures taken by the pharmacist in filling a prescription which require close personal contact with the customer are as follows:

1. The pharmacist must check to see that the name the physician wrote on the prescription is actually the name of the patient.

2. The pharmacist must determine if the patient is an adult or a child. If the patient is a child, the dosage becomes very important. The dosage of drugs is calculated on the bases of age or weight. If a child is given the adult dosage by mistake, the result could be fatal. The pharamacist is often asked by the physician to calculate the correct dosage for a child. The pharmacist must also determine that the dosage prescribed is the usual dosage for a patient of that age or weight.

In recent years, physicians have encouraged pharmacists to have a closer contact with patients in clinical settings. The pharmacist functions as a drug therapy consultant and keeps patient records which enable him to alert the attending physician of possible drug interactions and

reactions and to provide him with detailed information about each drug.

The patient must thoroughly understand the proper care and use of the prescription drug so he can correctly perform adequate self-administration.

The pharmacy schools in the United States in recent years have placed great emphasis on pharmacist-patient contact and the responsibility to see that the patient knows the essential information necessary to receive the maximum therapeutic benefit from the medication supplied to him by the pharmacist and to reduce the danger of improper use and harmful side effects.

In addition, the pharmacy schools in the United States and the profession of pharmacy have placed great emphasis on an expanded area of professional service in a clinical role for the pharmacist, referred to as "clinical pharmacy." This would involve the pharmacist as part of the health care team with doctors and nurses, wherein the pharmacist would act in an expanded role as a drug consultant. In a hospital or clinic, a pharmacist would be available in the patient-care area twenty-four hours a day. The pharmacist would take the patient's drug history on admission and instruct him in home use of prescribed medication on dismissal. During the patient's hospitalization, the pharmacist would maintain a complete pharmaceutical service record, monitor drug therapy, and relate it to clinical laboratory tests and adverse drug reactions. He would be available for consultation with the physician who plans the drug regimen; and he would assist the nurse in the management of the drug requirements involved in patient care plans for which she is responsible. In addition, the pharmacist becomes a readily accessible source of drug information. He is responsible for the analysis and confirmation of drug orders as well as the filling of these orders;

and he is available to the nurse prior to the time of drug administration.

The curriculum in schools of pharmacy has changed a great deal since 1967, with a much greater emphasis on patient care with emphasis on drug therapy. Clinical pharmacy will develop a greater patient-oriented attitude, and will involve much greater patient contact.

We feel that the cases in various states holding that a state may prohibit the practice of a profession by a professionally unqualified corporation through qualified and registered employees are equally applicable to the profession of pharmacy.

> "Indiana—*Bennett* v. *Indiana State Board of R. and E. in Optometry*, (1937) 211 Ind. 878, 7 N. E. 2d 977.
>
> Massachusetts—*McMurdo* v. *Getter*, (1937) 298 Mass. 363, 10 N. E. 2d 139; *Kay Jewelry Co.* v. *Board of Registration in Optometry*, (1940) 305 Mass. 581, 27 N. E. 2d 1.
>
> Pennsylvania—*Neill* v. *Gimbel Bros.*, (1938) 330 Pa. 213, 199 A. 178.
>
> Construing a statute as prohibiting a corporation from practicing optometry, directly, or indirectly, and from employing registered optometrists to examine the eyes of its customers was held in Neill v. Gimbel Bros., (1938) 330 Pa. 213, 199 A. 178 not to make the act unconstitutional as contravening the Fourteenth Amendment to the Federal Constitution. The court, which classified Optometry as a profession, said that the legislature had the right to forbid such practice as contrary to public policy, and pointed out that one who practices a profession is apt to have less regard for professional ethics and to be less amenable to regulations for their enforcement when he has no contractual ob-

ligations to the client, does not fix or receive the employment, and is under the control of an employer whose commercial interest is in the volume of sales of merchandise effected by the prescriptions of the employee-practitioner."

22 A. L. R. 2d 950.

"It is generally held that, in the absence of express statutory authority a corporation or individual not licensed to practice optometry cannot practice optometry through a licensed employee."

102 A. L. R., 343n (1936);

See also 128 A. L. R., 585n.

"If such a course were sanctioned, the logical result would be that corporations and business partnerships might practice law, medicine, dentistry, or any other profession, by the simple expedient of employing licensed agents. And if this were permitted, professional standards would be practically destroyed, and professions requiring special training would be commercialized, to the public detriment. The ethics of any profession is based upon personal or individual responsibility. One who practices a profession is responsible directly to his patient or his client. Hence, he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership, whose interests in the very nature of the cases are commercial in character."

Ezell v. *Ritholz*, (1938) 188 S. C. 39, 198 E. S. 419.

"As will appear from the subsequent discussion of the cases, there is no judicial dissent from the proposition that a corporation cannot practice law."

73 A. L. R., 328n.

"Since a corporation cannot practice law directly, it cannot do so indirectly by employing competent lawyers to practice for it, as that would be an invasion which the law would not tolerate. (citing cases)."

73 A. L. R., 1331n (1931).

Nor may a corporation practice medicine, surgery or dentistry through licensed employees.

"The majority, though not all, of the decisions on the subject hold that neither a corporation nor any other unlicensed person or entity may engage in the practice of medicine, surgery, or dentistry through licensed employees."

103 A. L. R., 1240n (1936).

"It has been recognized by the professions, by statutes and by decisions that a corporation offering professional services is not placed beyond legislative control by the fact that all services in question are rendered by qualified members of the profession.

"Liggett Co. vs. Baldridge, supra, is not parallel with the case at bar. We find nothing in that case which conflicts with the well-established rule that the State may deny to corporations the right to practice professions and insist upon the personal obligations of individual practitioners. Semler v. Dental Examiners, 294 U. S. 608; Winberry v. Hallihan, supra; People v. Peoples Stock Yards Bank, supra; People v. Painless Parker, Dentist, supra; Parker v. Board of Dental Examiners, supra."

Peo. v. *United Medical Service*, 362 Ill. 442, 455-6
200 N. E. 157 (1936).

Other states have recognized, as has North Dakota, that it may be necessary to *regulate ownership*, from which comes the instructions as to how the professional man shall practice his profession, ownership being the *controlling factor.*

> "An examination of the contract between the defendant corporation and its employee Jacobs shows the lack of Jacobs' control, for the company can dispense with his services on ten days notice whenever it concludes he is not producing enough sales of glasses to those referred to him for tests of the eyes. It likewise shows that Jacobs has nothing to do with the prices fixed for the sale of glasses, and for his own services to the customer he is paid by the company and not by the customer. *There is an entire lack of the relation that ordinarily exists between a professional man and his client.*" (Emphasis added).
>
> *State of Kansas* v. *Goldman Jewelry,* 142 Kans. 881, 51 P.2d 995, 102 A. L. R., 334 (1935).

As was said in *People* v. *Carroll,* 274 Mich. 451, 264 N. W. 861:

> "It is a well-known fact that in the profession of dentistry the services rendered are personal and call for knowledge in a high degree and that to *separate this knowledge from the power of control is an evil,* the correction of which was attempted by the instant legislation. The evils which arise from the divorcing the 'power of control' from 'knowledge' apply with equal force to a partnership as well as a corporation." (Emphasis added).
>
> *Lewis* v. *State Bd. of Dentistry,* 277 Mich. 334, 269 N. W. 194; and
>
> *Toole* v. *State Bd.,* 300 Mich. 180, 1 N. W. 2d 502, appeal dismissed 316 U. S. 648, 86 L. Ed. 1731

It should be noted again that many states have specifically, by statutory enactment and case law, designated pharmacy as a profession.

Colo. Rev. Stat. of 1953, Sec. 48—1-26;

Conn. 1961 P. A. 149, Gen Stat. Supp., Sec. 20-175;

Idaho Code, Sec. 54-1708;

Illinois Ann. Stat., 91 Sec. 55 (adopted 1955);

Kansas Gen'l Stat. Supp., Sec. 65-1641, 1642 (1953);

Louisiana Stat. Ann., Sec. 37-1197;

Maryland Code, Art. 43, Sec. 251;

Maine Rev. Stat., of 1954, Chapt. 68, Sec. 1;

Mass. Stat., C112 Sec. 42A (1960);

Minn., M. S. A. 151.06,6 (e);

Miss. Code, 1942 Sec. 8847;

Mo. Rev. Stat. Cum. Supp. 1961, Sec. 338.050;

Nebraska Rev. Stat., 1943, 1961 Cum. Supp. Sec. 71-101, 102;

Nevada Rev. St., Sec. 639.070 and 639.210;

New Mexico Stat. 1953, Sec. 67-9-10 (a);

McKinney's Consol. L. of N. Y. Anno. Book 16, Part 3 p. 89 and Sec. 6804g

No. Carolina Gen. Stat., Sec. 90-54;

Pages Ohio Rev. Code Anno., Sec. 4729.13;

Oklahoma Stat. Ann., Sec. 353.7 and Sec. 353.18 (b), Sec. 353.20, Sec. 353.26;

New Jersey S. A., 45:14-32.

California enacted a statute in 1955:

> "4606. Pharmacy a profession. In recognition of and consistent with the decisions of the appellate courts of this State, the Legislature hereby declares the practice of pharmacy to be a profession." Business and Professions Code, Sec. 4046.

> "We hold that under the facts in this case the pharmacist was practicing a profession * * * The practice of the profession of pharmacy is a part and parcel of the system of practice of modern medicine." *Boudot* v. *Schwallie*, 178 NE 2d 599 (Ohio 1961).

From the foregoing, it would seem to be undisputed that not only is the practice of pharmacy universally recognized as a profession, but that the store in which it is practiced and all of the surrounding factors which are provided by management are a proper subject for regulation under the police power of the several states. As a profession, pharmacy and the control thereof through ownership are intimately related to the public health and welfare.

The very inability of the respondent in this case to understand the importance of professional motivation in the control of the pharmacy and its efforts to disparage the profession as compared with others point up the damages which the legislature has sought to alleviate.

We can see no reason to treat the profession of pharmacy different than other professions which are not permitted to be owned and controlled by nonprofessionals or lay people.

Corporate Policy Prevents the Pharmacist from Practicing His Profession

The petitioner was not given the opportunity to present evidence relating to the statute in question to the public health, safety, and welfare since the case and questions of fact were decided by the trial court on a motion for summary judgment. We do believe that our arguments on this point are supported by facts and proper evidence would have been presented to the trial court.

The respondents point out that chain drug stores controlled 60.1% of the total national drug sales volume in 1972.

The sole purpose of chain drug stores or nonpharmacist controlled drug stores is to make money for its shareholders. The corporate policies of these stores are geared to make money and to do this certain professional services must be omitted.

We believe that certain corporate policies of the nonpharmacist controlled pharmacies are a detriment to the public health, safety, and welfare.

The prescription department is used by these stores as a loss leader just to bring in customers to buy their sundries, such as grass seed and furnace filters.

Because the advertising campaign of the chain drug store is based solely upon price, the public gets the impression that the only difference between one drug store and another is the price one pays for the drugs he receives. The customer in many cases is not aware of the additional and necessary services provided by a pharmacy which is pharmacist controlled. The small independent drug store cannot afford to lose money on the prescriptions he sells and offer the additional professional services because he cannot make it up on grass seed and furnace filters which he doesn't carry.

The chain drug stores keep their overhead down by keeping the inventory down and by purchasing the cheapest drugs available. Keeping the inventory down is accomplished by carrying in inventory only the fast moving prescription drugs. This results in certain drugs not being available to the public in such a store. These stores often purchase the cheapest generic drugs available.

Generic drugs may in many or most cases be equivalent, however, they are often manufactured by unknown

companies, where the possibilities of recall for defects is greater. The pharmacist should be allowed to purchase his prescription drugs from the manufacturer in whom he has confidence rather than being forced by nonprofessional owners to buy from a company he has never heard of just because their prices are lower.

Another method used by nonpharmacist controlled pharmacies to keep the overhead down is to keep the personnel or number of pharmacists down. It is not uncommon in such a store for a pharmacist to work the prescription department by himself and fill 80-100 prescriptions per day while also answering all incoming calls, acting as cashier and acting as stockboy in unrelated departments.

Because the corporation runs the prescription department with a minimum of personnel, it is not unusual that the pharmacist does not get a chance to take a lunch hour or to take a break during an 8 to 12 hour shift. Since dispensing medication is precise work, mental fatigue occurs and this condition is aggravated by no breaks, no food, and long hours. When mental fatigue occurs, the possibility of making mistakes increases.

Understaffing the pharmacy department to the point where the pharmacists must cut corners to keep up with the workload presents great danger to the public welfare. Often this results in refilling a prescription without first obtaining permission to do so from the physician. This practice is widespread and very hazardous to the public health.

Most pharmacists work for corporations which are nonpharmacist controlled. The corporate policies do not allow the pharmacist enough time to perform his professional services because he is forced to spend his time doing mundane chores that could be delegated to a clerk or stockboy. As a result of this misappropriation of time, the

pharmacist is not fulfilling the vital role he should be playing in the health care field. The result is that adverse drug reactions go unnoticed and the patient is not informed of the possible side effects to watch for or how to properly take the medication.

The philosophy of the owners of a drug store has a direct bearing on the quality of pharmaceutical service that is offered and the quality of drugs dispersed. The motivation of a professional man is different from that of a nonprofessional, particularly with regard to matters of stock turnover, sales volume, percentage of profit, number of pharmacists employed, and time available to confer with patients and doctors.

There is a conflict between commercial motivation and the ethical standards of the pharmacy profession. There would be a greater tendency toward substitution of one brand for another, and unauthorized filling and refilling of prescriptions in stores where there is no pharmacist ownership. Nonpharmacist owned stores sometimes refuse to compound prescriptions or to fill prescriptions at all. The conflicts between the commercial and professional aspects endanger the public health and safety and pharmacist employees of nonpharmacist owned stores could be influenced by the owners and such pharmacists are not free to make their own professional decisions. The operation of the pharmacy should be as much as possible entirely under the control of a pharmacist.

It is submitted that corporate policies in nonpharmacist controlled corporations, some of which have been set out herein, have prevented the pharmacist from effectively practicing his profession to the detriment of the public health, safety, and welfare.

The pharmacist in such a store is required to do so many nonprofessional services that he has no time to per-

form the professional services which are vital to safe drug distribution.

Other Matters Raised by Respondent's Briefs

We would admit that some nonpharmacist owned corporations which own drug stores conduct them in an ethical and professional manner. Laws such as the one we are concerned with in North Dakota are not passed to control those who are innately good citizens, but, rather, for the minority, who pose a real danger to the health and safety of the public. The point is, however, that nonpharmacist ownership results in greater probability of nonprofessional conduct and the pressures of commercialism are more apt to influence a policy-making and business-controlling nonprofessional than they are to influence a professional man in a similar position.

Argument is made by the National Association of Chain Drug Stores, Inc. that the chief benefit of chain drug stores is lower prices for prescription drugs. It may be that prescription drug prices are lower in chain drug stores, however, the primary reason for lower prices is that they do not offer the many necessary professional services to the public offered by other pharmacies, such as delivery of prescription drugs, patient medication monitory systems, open charge accounts, emergency and after hour service and consultation regarding side effects of various medication.

The respondent argues that since the State Board of Pharmacy failed to produce any evidence at any stage of the North Dakota proceedings tending to establish a relationship between the statute and the public welfare, that the trial court decision must stand.

As we have pointed out before, the petitioner did not have the opportunity to present such evidence. The ap-

plication for a pharmacy permit was denied by the administrative agency without a hearing because the appellant did not comply with the statute in question. No hearing by the administrative agency was necessary because at that point there was no constitutional question before the petitioner.

Upon appeal to the trial court, the respondent made a motion for summary judgment which precluded the petitioner from presenting evidence as to the relationship of the statute to the public welfare. We submit that the question of whether the statute is related to the public health, welfare, and safety is a fact question not properly decided on a motion for summary judgment. In addition, the petitioner was entitled to rely on the presumption that a statute is constitutional and the burden was on the respondent to rebut this presumption. The affidavits presented to the trial court in support of its motion for summary judgment do not pertain to the question of the relationship of the statute to the public welfare and clearly fail to rebut the presumption of constitutionality or shift the burden of proof to the petitioner on said motion for summary judgment. The trial court clearly erred in granting the motion for summary judgment in view of the presumption of constitutionality of the statute and the questions of fact present on this issue.

Respondents state that North Dakota is the only jurisdiction to have a pharmacist ownership or control restriction statute.

As pointed out in our brief, Michigan still has a 25% pharmacist ownership requirement, New York and Pennsylvania had a 100% ownership requirement until such statutes were declared unconstitutional by the *Liggett* case, and California, Maryland and Pennsylvania have statutes prohibiting physician ownership of pharmacies. In addi-

tion, New York, a recent session of its legislature, passed a statute similar to the one in question in North Dakota, however, the proposed statute was vetoed by the Governor of New York. Other states have similar type regulations.

Respondents point out on page 22 of their brief that the single argument offered to the North Dakota legislators to sustain the statute in question was to prohibit physician owned pharmacies and respondent then admits that this is a desirable restriction. If the North Dakota legislature decided that the statute in question was a proper way to restrict physician ownership of pharmacies, we do not feel that the United States Supreme Court will decide to sit as a super-legislature and decide that North Dakota should have written the statute differently. The statute has obtained its desired objective and does protect the public health, safety, and welfare.

Under the present standard of review of the Supreme Court such state statutes enacted under the power of the state to protect the public health, safety, morals or general welfare are presumed constitutional, with the presumption of facts before the Legislature to go with it, and only a very strong showing by those challenging the statute would cause the Court to declare a statute unconstitutional.

CONCLUSION

The philosophy of *Liggett* v. *Baldridge* upon which respondent's claims of unconstitutionality are based, has been abandoned by federal and state courts alike.

When a nonprofessional controlled corporation controls, and thereby practices a health profession, such as pharmacy, it forces its policies on the professional, thus prohibiting him from making the value judgments which

only he is qualified, by his education and professional responsibility to make. State laws which set out the qualifications for an individual to practice pharmacy which are enacted to protect the public health, welfare, and safety, must not be allowed to be circumvented by nonprofessional controlled corporations.

The holding by this court in the *Liggett* v. *Baldridge* case should be clearly reversed at this time and since the North Dakota Supreme Court based its decision entirely on the *Liggett* decision, the North Dakota Supreme Court decision should be reversed to conform to the current philosophy of the United States Supreme Court.

Respectfully submitted,

A. WILLIAM LUCAS
CONMY, ROSENBERG & LUCAS, P.C.
Counsel for Petitioner and Counsel of Record
411 North Fourth Street
P. O. Box 1398
Bismarck, North Dakota 58501